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MICHAEL RODAK, JR.,

In The

Supreme Court of the United States

October Term 1972

No. 73-145

In the Matter of

IMPERIAL "400" NATIONAL, INC., et al.,
Debtors,

UNION BANK OF LOS ANGELES,
Petitioner (Cross),

-against-

JOSEPH M. NOLAN,
Respondent.

CROSS PETITION OF UNION BANK FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

Supreme Court of the United States

October Term, 1972

No.

In the Matter of

IMPERIAL "400" NATIONAL, INC., et al.,

Debitors,

UNION BANK OF LOS ANGELES,

Petitioner (Cross),

-against-

JOSEPH M. NOLAN,

Respondent.

Cross Petition of Union Bank for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner, Union Bank of Los Angeles,[1] respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered April 23, 1973.[2]

1. Union Bank is a creditor in the reorganization of Imperial 400 National Inc. It believes that this writ of certiorari should be handled exclusively by the Judicial Council of the Third Circuit, but the Court of Appeals of outside judges assessed all the costs of the appeal (72-1920 and 72-1566) against Union Bank, and it would not presume that the Judicial Council will act for the Bank in this matter of costs. After discussion with the Clerk of the United States Supreme Court petitioner has decided to file this as a cross petition for certiorari in conjunction with the writ of certiorari to be filed by the United States Department of Justice on behalf of the Judicial Council of the Third Circuit.

2. By request of Appellant Nolan, the Chief Justice of the United States pursuant to 28 U.S.C. §294(d) appointed a special panel of outside Senior Circuit Judges to hear the appeals herein (Nos. 72-1566 and 72-1920). The appeals were consolidated by order of the Court of Appeals dated September 1, 1972.

Opinions Below

The opinion of the United States District Court of New Jersey (the subject of Appeal 72-1920) is reported as 346 F. Supp. 500.

The May 2, 1972 Opinion Memorandum of the District Court (the subject of Appeal 72-1566) is unpublished and attached as Appendix A. The decision of the Circuit Court of Appeals affirming the dismissal of Appeal 72-1920 without costs to any party and remanding Appeal 72-1566, the subject of this writ, with all costs against Union Bank is as yet unpublished and attached hereto as Appendix A 1.[3] The decision was 2-1, with a lengthy dissent by Judge Lumbard.

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3. This petition evolves from two separate actions consolidated for one appeal. On May 2, 1972 the District Court of New Jersey adhered to a resolution of the Judicial Council of the Third Circuit to implement that resolution and terminated the services of appellant as counsel to the Trustee in Reorganization. On May 31, 1972 the counsel (appellant therein) filed a notice of appeal to the Court of Appeals from the district court's May 2, 1972 order of removal (C.A.3, No. 72-1566).

The Appellant Nolan on May 2, 1972 also filed a complaint in the United States District Court for the District of New Jersey against all the judges of the circuit alleging that the Judicial Council resolution was unlawful and seeking reinstatement as attorney for the Trustee.

The Chief Justice of the United States, acting pursuant to a request by Nolan and 28 U.S.C. §294(d) assigned Senior Judge Thomsen of Maryland to handle the action. He dismissed the complaint on July 29, 1972 and Nolan appealed to the Court of Appeals from the foregoing order dismissing his independent suit (C.A.3 No. 72-1920). The two appeals were consolidated on December 1, 1972.

(Cont'd)

Jurisdiction

The Court of Appeals' opinion was entered April 23, 1973 (A 2). Union Bank's and the Judicial Council's time for filing a petition for rehearing was extended to May 4, 1973. Said petitions were then timely filed. The Court of Appeals denied by a vote of 2-1, the Judicial Council's petition for rehearing on May 24, 1973 and by the same vote denied the petition of petitioner Union Bank (A 3). The Court of Appeals' judgment and mandate was stayed on May 29th until a rehearing en banc decision was rendered. The Third Circuit en banc through Chief Judge Seitz rendered a decision on June 11, 1973 stating that a rehearing en banc was warranted but denying it on the grounds set forth in his opinion.[4] (A 4,

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(Cont'd)

A number of additional legal steps may be briefly noted. The District Court at first stayed its order of May 2, 1972 but vacated it on May 12, 1972. Nolan appealed from the order vacating the stay and this order was affirmed on June 20, 1972 (C.A.3, No. 72-1399) by a panel of the Court of Appeals consisting of Judges Biggs, Maris and Hastie.

Nolan also filed in the United States Supreme Court a motion for stay and a petition for a writ of mandamus or prohibition. The Supreme Court denied the relief (406 U.S. 956; 34 L.ed 2d 154).

4. The Court en banc stated that it had recused itself previously from hearing the appeals and that was the only reason it was recusing itself from a rehearing en banc and suggested that the United States Supreme Court hear the issues..."Moreover, we are hopeful that the Supreme Court will see fit to review this important matter...."

Jurisdiction

The Court of Appeals' judgment and mandate were stayed by order of June 18, 1973 pending filing of this petition on or before July 20, 1973 (A 7). This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

The Third Circuit (sitting en banc) decision denying a rehearing en banc suggests that the Supreme Court hear this matter and suggested in its opinion that the Supreme Court decide at least three questions (A 4, 42a).

1. Does either the District Court or the Court of Appeals have jurisdiction to invalidate action taken by the Council under its rule-making power?

2. Assuming jurisdiction, was it permissible for the Court of Appeals to make a judgment in this case, contrary to the Council's, that there was no need for a Council Rule, and invalidate it on that ground?

3. Assuming, contrary to the panel's position, that the rule is valid, is it invalid as applied to Nolan?

The Union Bank suggests a forth question:

4. Should (or may) a Circuit Court of Appeals (especially one composed of three outside judges who may not be familiar with the 7-year

history of this reorganization) where it affirms the dismissal of one of two appeals in a single opinion and sends the other appeal back for only a hearing, assess all the costs (totalling nearly $4,000) or any costs against the Union Bank, an unpaid creditor in the reorganization proceeding, where 80% of the assessed costs were the losing appellant's printing of his own unnecessary record (emphasis ours) in the suit Union Bank was not only not a party to, but where the Court of Appeals affirmed the lower court's dismissal? Was not this assessment both illegal and an unfair abuse of discretion?

Statement of the Case

The Third Circuit Judicial Council under 28 U.S.C. §332(a) had authority to pass a resolution affecting members of the Bar under its jurisdiction and to take whatever appropriate action was necessary to implement its resolution. A panel of three outside Senior Circuit Judges should not be the rule-maker for the Third Circuit Judicial Council. Said decision is in conflict with other circuits and decisions of the United States Supreme Court. Costs should not have been assessed against Union Bank.

Nature of the Case

On April 23, 1973, this Court reversed and remanded an order of the Federal District Court of New Jersey, dated May 2, 1972, which order removed appellant Joseph M. Nolan as attorney for the Trustee of Imperial "400" National, Inc. and

eight other corporations, debtors in proceedings for reorganization under Chapter X of the Bankruptcy Act (proceedings in Bankruptcy No. B-656-65 of such District Court). Said removal was based on a Resolution of the Third Circuit Judicial Council.

Underlying the majority's order is the discard of a rule adopted February 10, 1972 by the Judicial Council of the Third Circuit.

In remanding, this Court ordered a hearing as to whether, viewed as of the present, Nolan should be re-engaged as counsel. At such hearing, this Court directed that creditors may raise the question as to whether Nolan should have been discharged for cause. This Court also assessed, against this Petitioner, the cost of Nolan's brief and consolidated appendix even though 80% of the costs were incurred for the suit dismissed whose affirmance the Court of Appeals concurred in.

Reasons for Granting the Writ

I.

A PANEL OF CIRCUIT JUDGES SHOULD NOT DISREGARD A RULE ADOPTED BY A JUDICIAL COUNCIL THEREBY MAKING THE PANEL THE RULE-MAKER FOR THE CIRCUIT.

The identity of Council membership with membership among the active Judges of the Third Circuit, is apparent and dictated by statute, 28 U.S.C. §332(a). A panel of a court should not

discard a rule adopted by the entire court whose superiority in our judicial system is evidenced by its authority, acting en banc, to reverse its panel. See Harris v. Zion's Saving Bank & Trust Company, 127 F.2d 1012, 1015 (10th Cir. 1942) (Circuit Court will not declare unconstitutionality of General Order in Bankruptcy, adopted by Supreme Court), citing In re Bronx Ice Cream Co., 66 F.2d 620 (2d Cir. 1933) (only Supreme Court may declare the illegality of General Orders in Bankruptcy that it promulgates). The present posture of the case is belittling to the full Court.

The division of the panel itself, and the apparent disparity between the position of the panel's majority and the presumptive position of the Council, as indicated by the resolution in question, further suggest the appropriateness of a Writ of Certiorari or an en banc rehearing. See Civil Aeronautics Board v. American Air Transport, Inc., 344 U.S. 4 (1952) (three judge panel of Circuit Court unable to agree on a disposition and therefore certifying issues to Supreme Court, which suggests propriety of en banc hearing).

Nolan may reply that petitioner suggests his invitation to a predetermined hearing. But the flavor of the panel's opinion is that the Council over-reacted to an inadequately considered situation. It is a part of the judicial temperament for judges to review their own decisions and positions, in light of the presentations of all sides, and even to admit their initial error. This is what is done on any rehearing petition, for example, or as suggested by the decisions cited

above regarding a court review of its own rules. On disqualification motions, judges judge themselves. The Council's enabling laws do not contemplate disqualification of the Circuit Court from a matter questioning a Council order. As Judge Lumbard also said,

> "Such a ruling would render the Council's activity in pursuance of its responsibility wholly ineffective." Utah-Idaho Sugar Company v. Ritter, 461 F.2d 1100, 1104 (10th Cir. 1972).

In this situation, it has made the panel the rule-maker for the Council.

II.

THE MAJORITY HAS IGNORED THE IMPLICATIONS OF ITS DECISION AND HAS ACCORDED AN UNPRECEDENTED SCOPE OF REVIEW TO THE RESOLUTION CONTRARY TO ESTABLISHED LAW AND IN CONFLICT WITH OTHER CIRCUITS AND UNITED STATES SUPREME COURT DECISIONS.

The majority (in Appendix 2) acknowledges the Council's status as an administrative body (8a), upholds its rule making authority and recognizes the evils intended to be corrected by such rules (15a). But it nonetheless reviews the evidence and either

> (a) faults the rule-maker's determination of need for a rule ("The difficulty here is that the Council was not alerted to any general

need" (16a). "There was no need for a rule" (18a); or

(b) seeks to improve on the rule fashioned to respond to the ill ("[W]e point it out merely to show that the Council's resolution was not the only valid perception" (20a)).

The Court opens the doors to evidentiary and statistical review of court and Council rules. Its effect is to require the maintenance of a formal record upon which to justify rules. The opportunity for error once this broad course is tried, is also apparent, even from this case. For example, the majority concludes that after Nolan and Judge Shaw's resolution of the conflict problem in April 1971 — under which resolution Nolan could represent neither the Trustee nor Schiavone on reorganization plans of Imperial but could continue to represent both on all other matters — that,

> "Nothing occurred thereafter to cause the discovery that there was an impermissible appearance of conflict of interest, except a continuation of personal differences."

But petitioner's counsel, in a paper filed on another appeal, had remarked on Nolan's attendance at a subsequent meeting[5] with the Trustee, and Credi-

5. Nolan implicitly would acknowledge that his attendance was not in keeping with his bargain with Judge Shaw. In his letter of April 19, 1971 setting out a part of the accommodation, he said that according to the accommodation, he did not attend a meeting on April 16 but left the handling of the same to the Trustee. (Appellant's Appendix 65a). The same letter pointed out that the Trustee's accountants, who also represented Schiavone, had completely withdrawn from representing the Trustee.

tors Committee and, if the appearance of the Courts to the public is significant, Nolan's later discourtesy to representatives of a rival plan (Appellant's Appendix 432-434). (We also point out to the Court what is not apparent from the CCH Bankruptcy Law Report mentioned at page 4 of the opinion, that the third plan therein mentioned and also found unfair in the SEC's advisory opinion, was Schiavone's (9a)).

The real issue that should have been before the Court was whether the Council exceeded its authority under its enabling act. As for the role of courts in determining same:

> "Where the empowering provision of a statute states simply that the agency may make . . . such rules and regulations as may be necessary to carry out the provisions of this Act, we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." Leila Mourning v. Family Publications Service, Inc., U.S. Supreme Court No. 71-829, 4/24/73, 41 USLW 4517; see also Butz v. Glover Livestock Commission Company, U.S. Supreme Court No. 71-1545, 3/28/73, 41 USLW 4463.

The elaborations on this approach, as applied to court rules, are similar to those applied to other administrative rules: Court rules should be construed so as to sustain validity. Audiffren Refrigerating Machine Co. v. General Electric Co.,

245 Fed. 782, 788 (D.C.N.J. 1917). It is presumed that due weight has been given to all considerations underlying the court rule. King v. Weiss & Lesh Mfg. Co., 266 Fed. 257 (6th Cir. 1920).

Judge Harlan, in his concurrence in Chandler v. Judicial Council, notwithstanding his dismissal of the term "administrative" to characterize the acts of the Judicial Council, concluded that

> "I believe that these circumstances, taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice.
>
> * * *
>
> I consider the February 4 Order . . . to be a permissible interim step toward exploration and solution of the problem presented. 398 U.S. 74, 125.
>
> * * *
>
> The February 4 Order, entered pursuant to this statutory authority, is a supportable exercise of the Council's responsibility to oversee the administration of federal justice." 398 U.S. at 129.
>
> * * *

His use of the term "prima facie," while omitting to follow with a marshalling of the arguments and evidence contrary to the rule, indicates his

view that on finding the rule supportable, the review is concluded. Thus, Judge Harlan, while finding the Judicial Council action within the Court's appellate jurisdiction — when the majority could not so find — nonetheless did not exercise the scope of review exercised by the panel majority here.[6]

The panel majority acknowledges the several contacts of the Third Circuit with Imperial 400. Judge Harlan (as well as other commentators) further recognized that much information would come to the Council first hand. 398 U.S. at 127. For example, the Third Circuit was in receipt of a letter from attorneys for one of the plan proponents remarking on Nolan's continued anomalous position (Appellant's Appendix 168a). The minutes of the Council, particularly those at which the resolution was reaffirmed (Appellant's Appendix 92a), allude to deliberations. But the panel majority substitutes its judgment for the Council's as to the need for a rule and the terms thereof.

Indeed, the panel majority strains to find support for its conclusion that no rule was needed.

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6. See also Hanna v. Plumber, 380 U.S. 460, 471 (1965) involving a challenge to a Federal Rule of Civil Procedure, promulgated by the Supreme Court:

> "the [federal] court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."

A reading of 11 U.S.C. §557 suggests that the "special purpose of conducting the very complicated day-to-day operations of the estate" (19-20a) is the very purpose for which an interested person may not be engaged as attorney; the exception in the statute probably contemplates such engagements as that of out-of-state counsel to conduct a particular case.

The bloc affecting the panel majority so as to lead it into the evidentiary review, is the origin of the resolution in a single situation. Despite the majority's protestations that the same should not matter, it is this factor that leads it to conclude that the action comes uncomfortably close to a judicial act (17a). The majority echoes appellant's complaint that the resolution was an "in personam" judgment on him.

By analogy, however, the Administrative Procedure Act, at 5 U.S.C. §551(4) provides that:

> "(4) 'rule' means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." (emphasis added).

The Council made clear that insofar as the rule affected Nolan, it affected only his thereafter continued service as attorney, and that it did not imply any discipline for past acts.

In Jiminez v. Aristequieta, the Fifth Circuit disclaimed a charge that the reassignment of an extradition proceeding, per a Judicial Council

order calling for reassignment of the matters of a particular judge, constituted a review of that judge's actions. The reassignment was sustained. 311 F.2d 547, 554 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963).

But here, by indulging appellant's sensitivity despite the disclaimers of the Council, the panel majority puts a cramp into the operations of the Council. The interest of the Circuit in the speedy dispatch of reorganizations, particularly this one, is recognized, but when the delay lies in part in exacerbated relations between the reorganization officers and other parties, his removal can be procured only on some traditional ground of cause after evidentiary hearing. But the grounds of initial disqualification do not delimit the grounds of removal.

Bankruptcy and reorganization are troublesome responsibilities of the federal courts. With solvent businesses, the courts become involved only peripherally, on the petition of the business or its antagonists in particularized situations. But by constitution and statute, the federal courts are burdened with the entire supervision of a business once it is insolvent. The array of orders in Imperial illustrates the detail of involvement: petitions and orders to sell properties, hire lawyers and accountants, pay bonuses, settle accounts, etc. Creditors, suppliers, employees and stockholders wait while the Court plays out the difficult role of business doctor. This burden could be intolerable to the Court. A delegation system through referees, trustees and attorneys has been

devised to help bear it. They are truly court officers in that they are engaged to do the court's business.

In this instance, a recognized conflict and confidentiality problem hampered the officer in fully dealing with the assignment. An attempt was first made to divide business,[7] but this resulted in different lawyers working different aspects of a matter that are not truly wholly separable. (Plans classify creditors, for example. A claim compromise worked by one lawyer may affect one plan more than another.) This was not a practical way to get the job done, and it did not allay suspicions which continued to interfere with expeditious discharge of the business at hand.

One can conceive of other conflicts that would impair the effectiveness of a trustee or his attorney. In a private setting, neither participants nor outsiders would perceive such situations as disparaging judgments on anyone. By so perceiving them in court supervised settings, and therefore confining their resolution to substantiation, on hearings, of traditional grounds for cause, the Council will be hard pressed to honor the mandate to provide for the efficient dispatch of the Court's business.

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7. Not adhered to. See footnote 5.

Reasons for Granting the Writ

III.

THE DISPOSITIONS REGARDING COSTS ARE CONTRARY TO THE RESULTS OF THE APPEAL. THE AFFIRMANCE OF THE DISMISSAL OF 72-1920 WHERE 90% OF THE APPENDIX OF APPELLANT WAS FOUND MAKE THE CHARGES AGAINST A CREDITOR IN A BANKRUPTCY PROCEEDING OF 7 YEARS ALL THE MORE UNFATHOMABLE.

Appendices K through W of Appellant's Appendix, with all their subappendices, are designated by him (in the Table of Contents and at the beginning of each thereof) as part of the record on appeal in No. 72-1920. (The number actually recited is 1926, but 1920 is presumably intended.) These appendices begin at page 48 of the Appendix and run through page 619, or for over 90% of the Appendix. [8]

8. In addition Appellant's 600 pages plus of appendix was printed by Adam Press while Union Bank's short appendix was offset at a much cheaper price ($300 vs. $3600). Why should Union Bank be required to pay for a printed appendix, 90% of which was used by appellant in his lawsuit against the Judges of the Third Circuit which was dismissed by the lower court and where the Court of Appeals affirmed the dismissal? Judge Aldrich states in his opinion in the denial for a rehearing that he assessed the costs of appellant's appendix against Union Bank because of their disregard of the record. Yet it was the losing appellant that had the 600 page appendix. Furthermore, the losing appellant had received four interim fees totaling over $200,000, the last of which was paid in 1971. See "In The Matter of Imperial '400' National, Inc., Third Circuit 456 F.2d 926 1972." Union Bank has not only not received any interim fees but its claims have not yet been validated and the bankruptcy is eight years old. If the creditors of this estate never understood this proceeding before, they understand it less now.

The order in No. 1920 was affirmed against appellant. This is not a matter of a judgment being affirmed or reversed in part. The causes and appeals retained their separate identity and were separately disposed of by the panel. The costs of the appendix should at least be apportioned. See Missouri-Kansas Pipe Line Co. v. United States, 108 F.2d 614 (3rd Cir. 1939). (Consolidated appeals from two orders adverse to appellant's intervention in an anti-trust suit. Record of 361 pages printed by appellant and 1125 by appellees. Although appeals dismissed for want of jurisdiction, three-fourths of record cost assessed against appellees.) See also Parker v. Title and Trust Company, 233 F.2d 505, rehearing denied 237 F.2d 423 (9th Cir. 1956).

Moreover, petitioner did not ask for appellant to include so much paper on its appeal with the Judicial Council. It includes much matter on record in other appeals, some internal duplication and several briefs. These are not chargeable to petitioner. Fanchon & Marco, Inc. v. Paramount Pictures, 202 F.2d 731 (2d Cir. 1953).

Conclusion

The Rules of the Supreme Court (Rule 19-1) state that a writ will be granted ". . .Where there are special and important reasons therefor. . . ." The decision herein sought to be reviewed falls clearly into Section (b) of Rule 19-1. In addition to this panel's decision being contrary to other decided United States Supreme Court cases and Court of Appeals cases, the Third Circuit, en banc, has suggested that this Court hear the questions presented and is filing its own writ.

The panel majority has misconceived the permissible scope of review that flows from its own holdings. The consequent posture of the case is the overthrow of a rule applicable to the entire Circuit and adopted by the Circuit, by a panel thereof. This is accomplished by the panel's legislative finding that the rule has had, and can have, no general application. The finding belittles the Council and impairs its ability to preserve the integrity of the courts and expedite its business, particularly burdensome reorganizations which call for the federal courts to exercise skills not usual to judicial business. [9]

Certiorari should be granted to hear this matter and to consider its implications as to the Council and as to costs. The effectiveness of the Judicial Council and the rules of Congress should

9. This case is now proceeding in a gentlemanly expeditious fashion and possibly because of the Third Circuit Judicial Council and an excellent federal judge, it may terminate in 1974 - which will be 9 years in reorganization.

be preserved. The conflict between decisions of other circuits and the conflict and uncertainty thereby created in this decision and in the Chandler matter require grant of this petition for writ of certiorari to correct clear error.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the District Court May 2, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In the Matter of:

IMPERIAL "400" NATIONAL, INC.,
et als,

Debtors.

The attention of the Court was directed by the Chief Judge of the Circuit and the Chief Judge of the District to a resolution adopted by the Judicial Council of the Third Circuit which reads as follows:

> RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that the refusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest.

It had been the opinion of this Court that limitations imposed upon the function of Joseph M. Nolan, Esq., as counsel for the Trustees provided protection against any conflict of interest or even the appearance thereof. Such opinion of the Court has been overruled by the

above cited resolution of the Council and this Court considers the resolution as a mandate to terminate the services of counsel to the Trustee. Mr. Nolan is counsel to the Trustee and counsel to Schiavone Construction Corporation, the proponent of a plan of reorganization. This situation did not exist when Mr. Nolan was appointed and just as soon as he became aware of the fact that Schiavone was seriously interested in proposing a plan of reorganization, he made full disclosure of that fact to the Court and was authorized to continue to a limited extent which would not involve participation in any proceedings relating to the preparation and filing of a plan of reorganization or any other proceeding leading to the approval of a plan. There was no objection to continuance of the services of Mr. Nolan on this limited basis by any party in interest. But now retention of counsel for the Trustees, even with limitation upon activity, can no longer be sanctioned if the above cited resolution is to have effect.

Counsel for the Trustee has been afforded the opportunity to resign. It is clear now that he does not intend to do so. It is equally clear to this Court that it must give effect to the resolution of the Circuit Council. The above cited resolution mandates termination of the services of Joseph M. Nolan, Esq., as counsel for the Trustee and it is the duty of this Court to enforce the same.

Accordingly, it is on this 2nd day of May, 1972, ORDERED that the legal services of Joseph M. Nolan, Esq., as counsel for the Trustee be and the same hereby are terminated effective immediately.

Further ORDERED that Joseph M. Nolan, Esq., release all files of the bankrupt and deliver them to the Trustee forthwith and that he engage in no further representation of the Debtors henceforth.

s/ Robert Shaw
ROBERT SHAW
U.S.D.J.

Appendix A1

Order of Third Circuit Court of Appeals April 23, 1973

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 72-1566 and 72-1920

In the Matter of:
IMPERIAL "400" NATIONAL, INC.,

Debtor
Joseph M. Nolan, Appellant in No. 72-1566

(D. C. No. B-656-65 In Bankruptcy)

JOSEPH M. NOLAN,
Appellant, in No. 72-1920

vs.

THE JUDICIAL COUNCIL OF
THE THIRD CIRCUIT

(D.C. Civil No. 769-72)
ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: LUMBARD*, ALDRICH** and SMITH,
Circuit Judges

JUDGMENT

These causes came on to be heard on the records from the United States District Court

for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed August 2, 1972, in case No. 72-1920, be, and the same is hereby affirmed. In case No. 72-1566, the cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court. No costs in case No. 72-1920. In case No. 72-1566, all cost of appellant, including the cost of the entire consolidated brief and the appendix are taxed against Union Bank.

ATTEST:

s/ Thomas E. Quinn
Clerk

April 23, 1973

* Of the Second Circuit, sitting by designation

**Of the First Circuit, sitting by designation

Certified as a true copy and issued in lieu of a formal mandate in No. 72-1920 only, on May 15, 1973.

Test: THOMAS E. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Appendix A2

Opinion of the United States Court of Appeals for the Third Circuit, April 23, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1566 and 72-1920 Consolidated

In the Matter of
IMPERIAL "400" NATIONAL, INC., et al.,
Debtors

JOSEPH M. NOLAN,
Appellant in No. 72-1566

(D. C. No. B-656-65 In Bankruptcy)

JOSEPH M. NOLAN,
Appellant in No. 72-1920

v.

THE JUDICIAL COUNCIL OF THE THIRD CIRCUIT

(D. C. Civil No. 769-72)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 16, 1973

Before LUMBARD*, ALDRICH° and SMITH*,
Senior Circuit Judges

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* Of the Second Circuit, sitting by designation.
° Of the First Circuit, sitting by designation.

Opinion of United States Court of Appeals

OPINION OF THE COURT

(Filed April 23, 1973)

ALDRICH, *Senior Circuit Judge.*

These consolidated appeals from two proceedings in the New Jersey District Court present a single issue, the propriety, viewed in the circumstances under which it was adopted, of a resolution of the Judicial Council of the Third Circuit (Council), dated February 10, 1972, which provides as follows:

> "RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest."

On May 2, 1972 the district court, pursuant to this resolution, removed appellant, Joseph M. Nolan, Esq., as counsel for the trustee in reorganization of Imperial "400" National, Inc. Nolan appealed that order and also brought a petition of mandamus, or declaratory judgment, against the Council. The district court[1] dismissed the mandamus action, July 29, 1972, agreeing with the Council that Nolan had an adequate remedy by way of appeal to this court, and that the district court was without jurisdiction. 346 F. Supp. 500. We, too, agree, and Nolan's appeal from that dismissal must fail. We must, however, address ourselves to our dissenting brother LUMBARD's claim that we lack jurisdiction of the appeal from the original removal order. Since jurisdiction is always open it is, of course, not determina-

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1. Senior Judge Roszel C. Thomsen of the District of Maryland, sitting by designation.

tive that in the mandamus proceeding the Council itself took the position that we would have jurisdiction. We believe, however, that the Council—and the district court—were correct.

On this we see no real issue. We are not reviewing the action of the Court of Appeals, but, directly, of the district court. Admittedly we are reviewing indirectly the action of the Council, but the dissent's assertion that we have no power to do this is just that. The circuit council, while composed of judges, is an administrative body, and not a court. *Chandler v. Judicial Council*, 1970, 398 U.S. 74, 86 n.7. Reviewing the district court's May 2 order, which drew its substance from the Council's resolution, seems in no material respect different from reviewing a similar district court order which drew its substance from statutory provisions such as 11 U.S.C. §§557, 558. The latter task is our statutory duty under 11 U.S.C. §47. At least in a situation where there is a district court order capable of being reviewed, we see no reason, in the absence of any statutory provision, why the Council's actions are untouchable except by the Supreme Court, and we greatly doubt that that Court so thought when it declined to permit the filing of a petition for mandamus. *Nolan v. Judicial Council of the Third Circuit of the United States*, 1972, 409 U.S. 822. On this assumption we pass to the merits after, necessarily, a complex statement of the facts.[2]

THE APPEARANCE OF CONFLICT OF INTEREST

Appellant, Joseph M. Nolan, Esq., an experienced member of the bankruptcy bar, was appointed in February 1966 as counsel for the trustee in reorganization of Imperial "400" National, Inc., a chain of motels doing business in thirty-five states. The trustee successfully continued the operation of the business, but acceptable plans for reorganization did not materialize. Two plans, although a

2. Still further facts may be found in the thorough opinion of the district court in the mandamus action, 346 F. Supp. 500.

legedly favored by many creditors, were opposed by the trustee through Nolan as his counsel.[3] On April 14, 1971, orally, and April 19 in writing, Nolan advised the district judge in charge of the reorganization, Hon. Robert Shaw, now deceased, that a client of his law firm, Schiavone Construction Company, was interested in filing a plan. Judge Shaw replied on April 21 by a letter, with copies to all creditors:

> "If a good plan of reorganization which is more fair, equitable and feasible than any heretofore submitted may be available by participation of Schiavone Construction Co., I do not think stockholders, creditors and other parties in interest should be deprived of the benefit of such plan by reason of the fact that Mr. Nolan represents that corporation in other matters."

He went on to state that the trustee himself had no conflict of interest, and was a well-qualified attorney capable of representing himself with respect to reorganization plans, and that accordingly he was ordering Nolan to "refrain completely from any participation therein," but to continue to represent the trustee in all other matters.

> "If it is felt by any interested party that this is not the appropriate way to proceed to gain the financing of Schiavone Construction Co., the Court will entertain and consider objections which, if any, should be promptly presented."

We will not pause to consider the oversolicitude, if any, the court exhibited towards the trustee's counsel vis-a-vis the estate. In any event, no one objected, and two affirmatively assented—Union Bank of Los Angeles, a large creditor, hereinafter Union Bank, and the SEC. The SEC wrote that because it felt "the estate should not be deprived

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3. Since delay in the approval of a plan of reorganization bears on the case, we note that the trustee's opposition to these plans was shared by the SEC, which found them infeasible and unfair. CCH Bankruptcy Law Reports ¶64,496.

of the possible benefits arising from Schiavone's participation" it had no objection to the proposed procedure; the bank concurred, with a similar statement. Thereafter New York counsel appeared for Schiavone, and Nolan continued to represent the trustee in a substantial amount of day-to-day legal work unconnected with reorganization plans.

THE CLIMATE

Pre-Schiavone

Thus no conflict of interest of a disqualifying nature was perceived, at least to the point of accepting the court's open invitation to speak up. We lay particular emphasis upon this not only because of its general significance, but because well before that date matters had not been going to everyone's satisfaction, and the parties had become engaged in recriminations on a markedly personal level. Union Bank was represented by one Lawrence W. Levine, Esq., who was also chairman of the creditors' committee. His vigorous attacks on the trustee and his counsel in connection with their requests for interim fees, of which there were several, were characterized by the district judge at one point as "allegations of lack of integrity and suggestions that there is deliberate mismanagement of the estate." Nor did Nolan fail to respond in kind. The Court of Appeals had found one of the district court's fee allowances substantially excessive,[4] and doubtless the controversy was exacerbated when the district court, on receipt of the mandate, on March 10, 1971 excused the payment of interest on the amount obliged to be refunded.

Post-Schiavone

In April, 1971, Nolan's new, in the sense of more limited, position was approved. Nothing occurred thereafter to cause the discovery that there was an impermissible

4. *In the Matter of Imperial "400" National, Inc.*, 3 Cir., 1970, 432 F.2d 232.

appearance of a conflict of interest, except a continuation of personal differences. In the appeal taken from the district court's failure to assess interest, which Levine used as a vehicle to suggest Nolan's removal, ante, Levine filed an affidavit in 137 paragraphs attacking Nolan, and Nolan, in reply referred, *inter alia*, to "Levine's flow of nonsensical and scandalous statements." One of Levine's charges totally irrelevant to the question of interest on the refund was that Nolan had sued Union Bank for eight million dollars in order to induce the bank to drop its support of another plan and to favor Schiavone's. Ultimately the district court's fee decision was reversed again.[5]

The Court of Appeals did not enter into these controversies between the parties more than it could help.[6] However, in its 1970 opinion, the court spoke of "the friction which apparently exists," and "suggest[ed] that the trustee and his counsel make a greater effort to work with the creditors and other interested persons in an effort to terminate this lengthy reorganization proceeding with dispatch. . . . The main business of the trustee and his attorney at this point should be to press forward to an acceptable plan of reorganization, not to concentrate on their 'personal interests.'" 432 F.2d at 240-41 n.28, 29. Again, in the 1972 opinion, the court referred to the "widespread dissatisfaction with the failure of the . . . fiduciaries to secure action by the court on a reorganization plan." 456 F.2d at 931.

COUNCIL ACTION

On January 22, 1972, five days before the interest-on-fee-refund case was to be argued to a panel, Levine addressed a letter to the court, stating that while there was no

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5. *In re Imperial "400" National, Inc.*, 3 Cir. 1972, 456 F.2d 926.

6. The court did note on one occasion that the "briefs contain considerable material irrelevant to the issues presented by these appeals," 456 F.2d at 931-32, n. 15, a very modest description.

motion filed to remove the trustee and his counsel, and while he did not wish time for oral argument on that subject, he felt the court "could exercise its equity power" to remove the trustee and his counsel, "which we hope it will and of its own volition." It does not appear what transpired at the argument, but thereafter two members of the panel, who had also been members of the previous panel, wrote a letter to the Chief Judge of the circuit. This letter is substantially quoted in the opinion of the district court, 346 F. Supp. 504-05. In substance it suggested that the Chief Judge "should at least suggest to the assigned district judge or Chief Judge Augelli that such counsel should withdraw as counsel for the trustee." The letter stated that even though Nolan was no longer advising with respect to reorganization plans, he did advise the trustee on all other matters, and that the public was unlikely to understand such action, particularly in view of the litigation over fees. "The fact that Schiavone Co. has New York counsel to represent them on the plan will not overcome, in the minds of laymen, the continuing representation of this company in all other matters by the Nolan . . . firm."

The factual accuracy of the letter is disputed by Nolan. The letter stated that the trustee was favoring the Schiavone plan, "even though a plan favored by many of the creditors had been submitted many months before the Schiavone plan and gives them cash, which is what they want." While one of the alternative plans did provide cash, the cash element was apparently inserted by amendment after the Schiavone plan was filed.[7] Further interstices in the Council's knowledge will be touched upon later. However, the thrust of the letter was not to attempt to resolve the issues between the parties, but to eliminate them by summarily removing counsel, thus avoiding the "danger of adverse publicity affecting the entire federal bankruptcy system."

7. We think the inaccuracy in this respect attributable to a misunderstanding by the judges of an earlier letter from counsel which we find in the record.

On February 10 the court, meeting as the Council, unanimously, except for two judges not voting, adopted the resolution in question. A month later the Chief Judge wrote to Judge Shaw, paraphrasing the resolution in general, rather than in its narrow terms, and suggesting that Nolan be given the opportunity to resign. The letter concluded,

> "I realize that this will be of real concern to you but I know you realize that some of the appeals in this case have caused much concern to the judges hearing them."[8] 346 F. Supp. at 514.

Judge Shaw replied that Nolan was unwilling to resign because he, and the Judge, felt it would be acknowledging a fault which was not recognized, and that they both felt that if there were to be a removal it should be for cause, as to which "Mr. Nolan insists . . . he is entitled to an evidentiary hearing." In further correspondence, in which the resolution was explicitly set forth, the Chief Judge continued "to emphasize that [the] resolution is directed at the *appearance* of a conflict of interest. . . . We are talking policy." Since cause was not asserted, he repeated, there was nothing personal, and no hearing was called for.

Nolan continued to disagree. Ultimately this discussion was obliged to come to a halt, and with a detailed protest that he should not have been required to do so, Judge Shaw on May 2 terminated Nolan's retainer. Attempts to obtain an interim stay pending appeal failed,[9] and ultimately the present panel of senior circuit judges from outside the circuit[10] was designated by the Chief Justice.

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8. The dissent's suggestion that it was "altogether likely that [in the month prior to this letter] attempts were made informally to secure Judge Shaw's compliance" is, to us, contra-indicated by this language and further language quoted from the letter in n. 13, post, and finds no support in the record's extensive report of interchanges.

9. *See* 346 F.Supp. at 507.

10. We note that two members, as former chief judges, headed their own councils for 11 and 8 years, respectively. The panel took immediate steps to expedite the hearing of the appeal.

THE POWERS OF THE COUNCIL

28 U.S.C. §332 provides as follows.

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

Appellant contends that "this statute, as written and as employed is unconstitutional." As to the first, his brief is singularly unpersuasive. It cannot be unconstitutional to authorize the courts to manage their own business. It is doubtless true, as the Court pointed out in *Chandler v. Judicial Council of the Tenth Circuit*, 1970, 398 U.S. 74, 85 n.6, that the statute "is not a model of clarity in terms of the scope of judicial councils' powers," but we believe this lack merely raises issues of construction. As to this innumerable authorities with diverse qualifications have asserted that the phrase "effective and expeditious administration of the business of the courts" is to be broadly construed. *See* Brennan, The Continuing Education of the Judiciary in Improved Procedures, 28 F.R.D. 42, 43 (1962); Burger, The Courts on Trial, 22 F.R.D. 71, 74-77 (1958); Hearings on H.R. 2973, H.R. 5999 Before the House Comm. on the Judiciary, 76th Cong., 1st Sess., 22 (1939) (remarks of Judge John J. Parker); Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. Chi. L. Rev. 203, 206 (1970). The reasons seem clear. The individual district judge has his own docket to consider, and his own problems. There must be a body with a broader horizon, and a broader responsibility, to oversee the district court as a whole, not just in regard to day-to-day operations and internal problems, but in the larger perspective of the court's place in the body politic.

Nowhere has the present aspect of that duty been better expressed than in a Report of the Judicial Conference

of the United States at its June, 1961 meeting on the Powers and Responsibilities of the Judicial Councils, presented to the House Committee on the Judiciary by the Honorable Emanuel Celler, Chairman, 87 Cong., 1st Sess., H.D. 201. Included in the Conference's conclusions is the following,

> "(2) The responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts."

We note in this connection that Chairman Celler stated in his Foreword,

> "Since I, at the time [that section 332 of Title 28 was enacted] was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice."

We have no question but that there is included in this area the important matter of conflict of interests.

Nor do we accept appellant's contention that a judicial council lacks rule-making power. His argument that this would destroy uniformity flies in the face of the fact that every court of appeals, not to mention many district courts, has its own local rules. The caveat is that such rules must not conflict with rules that have been made effective

nationally. *See In re Mandell*, 2 Cir., 1934, 69 F.2d 830. If a court of appeals may make rules for itself, we see no reason why a judicial council, sitting as an administrative body, cannot, short of exercising traditional judicial functions, *see* post, enact appropriate rules, or resolutions, applicable to all courts within its circuit. *See, e.g., United States ex rel. Frizer v. McMann*, 2 Cir., 1971, 437 F.2d 1312, 1317 (issuance of rules covering prompt disposition of criminal cases). This, however, does not answer the present question.

THE RESOLUTION IN CONTEXT

In spite of the foregoing, we are deeply troubled by what occurred in the present case. The fact that the resolution worked individual hardship to appellant is not determinative. Rules, and the maintaining of public relations, *cf. Barr v. Mateo*, 1959, 360 U.S. 564, 574, may often work individual hardship.[11] Nor is it necessarily determinative that the resolution was occasioned by a particular situation. General rules must often be made in response to some event that calls attention to their need. The difficulty here is that the Council was not alerted to any general need. Although not so couched, the resolution was not only triggered by, but tailored to, a case quite apparently unique. The SEC, which has statutory supervision of Chapter X reorganizations, 11 U.S.C. §608, informs us through its Solicitor that it has never heard of a case other than the one at bar that would come within this resolution. Nor have we been able to discover one. The action accordingly comes uncomfortably close, perhaps too close, to a function denied to the Council, the exercise of "traditional judicial powers." *Chandler v. Judicial Council*, 398 U.S. 86 n.7.

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11. As a small example, we note the recent case of *Lipman v. Massachusetts*, 1 Cir., 1973, — F.2d —, which involved a state court denying a court reporter the customary opportunity to profit by selling copies of transcripts to the public.

What particularly troubles us in these circumstances is that some members of the body adopting this, in effect, in personam resolution had been exposed to highly defamatory accusations against appellant, had been themselves "much concern[ed] by the appeals, and had expressed by no means insignificant criticisms. Moreover, the only information presented to the Council as a whole was, in its factual aspects, both inaccurate and incomplete. Viewed from the standpoint of appellant, it must be thought ironic that at, or at least following, the suggestion of his antagonist, he should be condemned unheard by a body whose very excuse for acting was the necessity of maintaining public confidence in the fairness of the courts. The explanation that he was not being discharged for cause, but only for the appearance of a conflict of interest, could be less than satisfying, especially so since in the year between Judge Shaw's letter to the creditors and the Council's action it was only the substantive attack on Nolan, and not the conflict of interest situation, that had changed. Even when the decision was unquestionably for appearances only, and the atmosphere was entirely devoid of personal criticism, a far cry from the present case, such assurances are not always found convincing. See dissenting opinions in *Rapp v. Van Dusen*, 3 Cir., 1965, 350 F.2d 806.

The circuit council is a valuable arm of the courts, and nothing we say in this opinion should be taken as denigrating its great importance. But like any administrator we believe its success may be measured by its lack of visibility. We suspect that some who have criticized councils for inactivity are unmindful of the saw that still waters run deep, and that the most effective actions are often the most inconspicuous. But, conversely, we think nothing would furnish potential critics of the circuit council with ammunition more than would over-action. As one member of the present panel has wisely stated, "Those who comprise the councils must do the work by example, leadership, and persuasion. The making of orders and their publication should be the last resort, rather than the first." Lumbard,

The Place of the Federal Judicial Councils in the Administration of Justice, 47 A.B.A.J. 169 (1961).

THE APPROPRIATE PROCEDURE

If an order was necessary, the circumstances demanded procedural protection for Nolan. As the Court stated in Goldberg v. Kelly, 1970, 397 U.S. 254, 262-63, appropriate procedural protection depends on the nature of the injury to the grievant and whether the latter's interest in avoiding the injury "outweighs the governmental interest in summary adjudication." The consequences to appellant —not to mention the estate—were drastic, particularly in the light of the atmosphere of charges of misconduct. Moreover, summary action by the Council was manifestly unnecessary. There was no need of a rule; Nolan (or, quite possibly, Levine), was the problem. There was no reason, even timewise, as the chronology makes clear, why there could not have been a hearing. Indeed, we suggest that summary action in the circumstances of this case, rather than serving any important governmental interest, constituted an inadvertent disservice to the concept of circuit councils. While this was not as serious as a disbarment, *cf. In re Ruffalo*, 1968, 390 U.S. 544, and Nolan did not have, perhaps, the equivalent of tenure, *cf. Perry v. Sindermann*, 1972, 408 U.S. 593, we note Mr. Justice Harlan's statement, concurring in *Chandler v. Judicial Council*, ante, 398 U.S. at 127.

> "There is much in our tradition of due process of law that runs counter to the taking of serious action on the basis of *ex parte* assertions or suspicions of misbehavior."[12]

12. The dissent's suggestion that Nolan might have asked for reconsideration by the Council, we regard as unrealistic. It is true that he could have asked. In the light, however, of the detailed response, ante, to Judge Shaw's letter protesting Nolan's removal without a hearing, we cannot think that a further request, however put, would have been productive.

We would be more moved by the dissent's assertion that the "Circuit Council was in the best position to determine what measures should be taken" if it had followed that advice.

We might also feel differently if the resolution was an inevitable truism, as the dissent apparently suggests. But while we agree with the dissent's general discussion of conflict of interests, we feel that the issue as it relates to bankruptcy proceedings is a good deal more complex. There is no doubt but that the limitations imposed by Judge Shaw upon Nolan's retainer did not, in fact, eliminate all appearances of a possible conflict of interest. Indeed, we regard Nolan himself as so conceding during oral argument. The SEC fully conceded it, but stated it had accepted the situation after a "balancing of several considerations." In brief, the SEC believed that the conflict of interest problem was outweighed by the potential delay in the proceedings caused by removal of an officer who, over a period of five years, had accumulated substantial familiarity with the estate. The Council's action was taken without knowledge of this position of the SEC.[13]

The SEC's pragmatic stance was consistent with the bankruptcy law; complete disinterestedness is not required in all aspects of bankruptcy proceedings. *Cf. In re Eloise Curtis, Inc.*, 2 Cir., 1964, 326 F.2d 698. For example, 11 U.S.C. §557, which provides that the attorney for the trustee must ordinarily be disinterested, contains a proviso, "that for any specified purpose other than to represent a trustee in conducting the proceeding under this chapter the trustee may, with the approval of the judge, employ an attorney who is not disinterested."[14] The present case could be

13. We do not find that the Council was even aware of the extent that the district judge in charge of the reorganization had conferred with the creditors. In his original letter to him, the Chief Judge referred to "your actual or tacit approval," a phrase we would think inconsistent with such knowledge. Instead, as the dissent significantly remarks, it was "aware that on two occasions creditors had objected that the district judge had been overgenerous to the trustee and his counsel regarding fees."

14. *Compare* 11 U.S.C. §72(c): "An attorney shall not be disqualified to act as attorney for a receiver or trustee merely by

thought to be an unusual, but nevertheless, permissible application of this statute: Nolan was employed for the special purpose of conducting the very complicated day-to-day operations of the estate, short of the plan of reorganization, with which he had become experienced and proficient.

We do not affirmatively adopt this position; we point it out merely to show that the Council's resolution was not the only valid perception. Not only did the district court feel differently, but so, apparently, did every creditor when the issue was first presented. While we agree with Union Bank that it should not be "estopped" by its initial acquiescence in the court's proposal, we cannot disregard its evidentiary effect. And, finally, we must give especial weight to the SEC, an impartial body experienced in these matters.

By this we do not mean that the SEC was right, or not right. But given this situation, the Council could easily have suggested a district court hearing on the issue of appellant's continued service, the hearing to include the sort of balancing adopted by the SEC. *Cf. In re Pittsburgh Rys. Co.*, W.D.Pa., 1948, 80 F.Supp. 15.[15] A district court could have made a determination on a full record with, if desired, appellate review, and this would have solved the problem consistently with the interests of the parties and the Council's purpose of protecting the integrity of the court system.

We remand the case to the district court for a hearing as to whether, viewed as of the present, Nolan should be re-engaged as counsel for the trustee. Since substantial time has passed since his removal, the district court

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reason of his representation of a general creditor." Section 72(c), primarily a general bankruptcy provision, applies to reorganization proceedings, but is modified in that context by section 557 and section 558. *See* Dodd, Exchange Commission Reform Program, 38 Colum.L.Rev. 223, 230-31 (1938). *Cf.* 11 U.S.C. §556.

15. If, in the light of *Chandler*, it could be thought not a forbidden in personam judicial decision, the Council could have conducted a hearing itself. *Cf. In re Rodebaugh*, 1950, 10 F.R.D. 207. The Council did conduct a hearing in *Chandler*.

should weigh the conflict of interest problem as it now stands against the beneficial—or harmful—effects of re-engaging appellant at this point in the reorganization. At such hearing, if they so desire, creditors may also raise the question whether matters had reached a point where appellant because of his conduct or the appearance of a conflict of interest, or both, should have been removed for cause. Appellant has no right to recover for loss of any fees which he might have earned, regardless of how it came about that his retainer was terminated.

In No. 72-1920 the order of the district court is affirmed. In No. 72-1566 the matter is remanded to the district court for further proceedings consistent with this opinion. No statutory costs in No. 72-1920, but appellant shall recover all costs in No. 72-1566, including the cost of his entire consolidated brief and appendix, to be charged against Union Bank.

LUMBARD, Circuit Judge (dissenting):

I dissent. The appeal from Judge Shaw's order should be affirmed. As to the appeal from the district court's dismissal of Nolan's petition for writ of mandamus, I would affirm because in my opinion a district court is powerless to entertain a petition to mandamus the circuit council.[1]

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1. With all respect to the circuit judges of the Third Circuit, I suggest that the active circuit judges should not have recused themselves from hearing these appeals; instead, they should have sat as the Court of Appeals en banc. Thus the same judges making the order under attack would have heard the appeal. They could have held a hearing forthwith, or not, as they decided. The judges would be sitting in a dual capacity—as a court of appeals sitting en banc and as the circuit council. The business of supervising the district courts and their officers is for the active circuit judges of the circuit. When they order something to be done, in the exercise of their section 332 powers, it is their duty to see that it is done; whether on appeal or by review of the denial of a petition for

In making his order of May 2, 1972, which terminated the services of Joseph M. Nolan as attorney for the trustee, Judge Shaw carried out the following resolution of the Circuit Council for the Third Circuit:

> "RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest."

This resolution of the Circuit Council was binding on all the district courts of the circuit and on all the officers of those district courts, which included counsel for trustees in reorganization proceedings, such as Joseph M. Nolan. The order of the Council was and is the law of the circuit.

Admittedly the Circuit Council order of February 10, 1972 was intended to apply to this appellant Nolan. It is undisputed that there was pending and under consideration by the district court, the trustee, and the creditors, an offer for reorganization of the debtor corporation made by Schiavone Construction Company, which, since November, 1965, had been a client of the law firm of Nolan & Lynes of which Nolan was the senior partner. It follows that Nolan could no longer continue to serve as counsel to the

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mandamus. In any event, such action ought not to be viewed as a cause of disqualification, even though those affected by the order ask for it.

It is to be hoped that the action of the circuit judges of the Third Circuit in recusing themselves will not be followed by other circuits. Nothing could be more destructive of supervisory authority than to have cases such as this passed upon by circuit judges from another circuit. Subject only to corrective action by the Supreme Court, circuit council action should be followed by speedy compliance, as the statute contemplates; it should not be permitted to spawn litigation and delay beyond what the circuit council may determine to allow.

trustee. Consequently, we should affirm Judge Shaw's order of May 2, 1972.

No district judge or panel of the Court of Appeals for the Third Circuit, no matter how constituted, has the power to question the action of the Circuit Council of the Third Circuit. The circuit judges of the Third Circuit have spoken, in accordance with powers conferred on them acting as a Circuit Council. It would be altogether incongruous for any lower court or single panel of judges in the Court of Appeals for the Third Circuit to pass upon whether what the Council has done is a lawful and proper exercise of the Council's powers. There is no statutory authority or precedent for such review.

Appellant's only recourse was a petition to the Circuit Council to review its action or a petition for mandamus to the Supreme Court. Although the majority opinion in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), which is the only Supreme Court case that has considered the power of the circuit councils thus far, did not reach the question of whether the Supreme Court had jurisdiction to issue a writ of mandamus to a circuit council, Justice Harlan, in a separate concurrence, found that the Supreme Court had jurisdiction under the All Writs Act, 28 U.S.C. §1651, to entertain petitions for mandamus. Justices Black and Douglas, though dissenting from the majority's disposition of the case, agreed with Justice Harlan that the Supreme Court had jurisdiction.[2]

At the same time, on the merits I am convinced that the action of the Circuit Council was well within its powers and that the appellant has no basis for complaining that in directing the termination of his services he was deprived of due process of law.

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2. It must be noted, however, that on October 11, 1972, the Supreme Court denied without opinion appellant's petition for leave to file a Writ of Prohibition and/or Mandamus directed against the Circuit Council for the Third Circuit. 41 U.S.L.W. 3189 (U.S. Oct. 11, 1972).

The order of the Circuit Council was an entirely proper exercise of its powers under 28 U.S.C. §332 to supervise the conduct of business in the district courts and the manner in which officers of the court should conduct themselves so that public confidence in the impartiality of the courts and their officers should not be impaired. As was conceded at oral argument, the continuance of Nolan as counsel to the trustee while there was pending for consideration a plan of reorganization suggested by a client of Nolan's firm presented the appearance of a conflict of interest. It seems clear to me, as it did to the Circuit Council, that the appearance of impropriety could not be cured by an announcement that Nolan would not advise regarding the offer of his client; the appearance of a conflict would persist so long as he continued in daily service to the trustee.

The Circuit Council was in the best position to determine what measures should be taken to offset the obvious stigma which would have tainted the proceedings if Nolan had continued as counsel. The power to make orders was given to the circuit councils precisely because they are in the best position to decide what corrective steps should be taken when such situations are brought to their attention. Here several members of the court had recently been alerted to the situation because they had heard appeals from orders of Judge Shaw in the same proceeding, 432 F.2d 232 (1970) and 456 F.2d 926 (1972).

We must look to the circumstances surrounding the enactment of §332 and the operation of the circuit councils in the performance of their supervisory powers since 1939 in order properly to evaluate the order of the Third Circuit Council. I think such an inquiry demonstrates that the councils were intended to exercise the broadest powers with respect to supervising the administration and conduct of the district courts including district judges and officers of the court, in order to promote efficiency and proscribe any activity which might impair public confidence in the proper and impartial administration of justice. Moreover, it was

intended that the councils should use these powers in whatever manner seemed best calculated to deal with particular situations.

Until 1939 there was no means of supervising the administration of the district courts, or the activities of district judges or officers of the district courts, apart from determining questions raised in litigated cases. By then the need for more immediate and constant control had become clear. Chief Justice Hughes voiced the feeling of the Supreme Court that such power should not be centralized in that Court. He said to the Judicial Conference in September, 1938:

> "Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various circuits—immediate responsibility for the work of the courts in the circuits, with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit.
>
> Now we have had in the States considerable effort in this direction through the appointment of judicial councils. * * * My thought is that in each circuit there should be an *organization which will have direct and immediate responsibility with regard to the judicial work in that circuit.* [Emphasis supplied.]
>
> My suggestion for your consideration is that there should be in each circuit a judicial council. * * *
>
> * * * * *
>
> When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional

one. And the circuit judges know the judges personally in their districts; they know their capacities. And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice."

Judicial Conference of the United States, Report on the Powers and Responsibilities of the Judicial Councils, H.R. Doc. No. 201, 87th Cong., 1st Sess. 3 (1961).

Thus was born the idea of making the circuit councils the vital centers for supervision and corrective action. A Committee of the Conference then collaborated in the preparation of legislation, which was passed after hearings before congressional committees at which testimony was given by members of the Judicial Conference, notably Chief Judge Groner and Chief Judge Parker. Judge Groner said:

> "Under the present judicial setup we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, *or properly could be made the subject of criticism, for which he may be responsible* . . . [emphasis supplied.]"

H.R. Doc. No. 201, *supra* at 5.

Before the House Judiciary Committee Judge Parker gave the following testimony, which is quite revealing on the question of what power the circuit councils were intended to have:

> "JUDGE PARKER. This (council) can deal with all sorts of questions that arise in the administration of justice.
>
> MR. CELLER. Do you put any restraint on the council at all?

JUDGE PARKER. I do not think this bill does. Of course, I assume this is true: That the councils will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it and that would probably be the end of the matter."

H.R. Doc. No. 201, *supra* at 5.

The Judicial Conference draft became law in August, 1939. The relevant part of §332, as it has read since a 1948 rearrangement which made no substantial change, provides as follows:

"Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the circuit council."

In recent years the circuit councils have been frequently criticized because they have not made greater use of their powers. The appearance of inactivity has arisen largely because much of the supervision by the councils has been accomplished informally and not by written or published order; it has been done by telephone or private interview. In almost every case the fact that the circuit council had the power to make orders has rendered it unnecessary to do so in a formal way. A suggestion from the chief judge or one of the circuit judges almost always has gained ready compliance. Rarely have the councils found it necessary to enter a formal order. Even more rarely has any order been published. And until this case arose, Chandler v. Judicial Council of the Tenth Circuit, decided by the Supreme Court in 1970, 398 U.S. 74, is the only reported case wherein action by a circuit council has been questioned.

Meanwhile, questions concerning the operation and powers of the circuit councils have been frequently considered by the Judicial Conference and its committees. In

March, 1961 the Judicial Conference adopted a Report on the Powers and Responsibilities of the Judicial Councils which detailed the background of §332 and its legislative history and set forth certain conclusions, of which the second is specially relevant here:

> "(2) The responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts."

H.R. Doc. No. 201, *supra* at 8-9.

The report also concluded that §332 was "adequate to enable the judicial councils, on proper exercise of their responsibilities, . . . to assist in achieving 'the effective and expeditious administration of the business of the courts.'" Id. at 9.

The Judicial Conference Report was printed in July, 1961, as House Document 201, 87th Congress, 1st Session, with a foreword in which Emanuel Celler, then Chairman of the Judiciary Committee, stated:

> "Since I, at the time, was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice."

The Report also shows that it was the expectation of those judges who recommended placing responsibility in

the circuit councils, and also of the Congress, that the councils, in exercising their powers under §332, would in most cases be able to operate informally and without the need of transmitting and publishing written orders.

In my opinion, the Circuit Council had the power to require that any officer of a district court could continue to act as such officer only so long as his so acting did not raise any serious question of the fairness and impartiality of the consideration of the court's business. When Nolan's client filed a plan for reorganization it was immediately obvious to all concerned that Nolan could not continue to give any counsel regarding reorganization plans. Judge Shaw thought it was enough to announce that Nolan would not advise regarding that plan. Quite understandably the Circuit Council differed. Since the Circut Council has the power to supervise the administration of the district courts, and has the responsibility to do so in a way designed to maintain public confidence in the administration of justice, its order must prevail. While the record is silent on what if any overtures were made to Judge Shaw before the matter was discussed at the February 10, 1972, meeting of the Council, and during the interim before Chief Judge Seitz's letter of March 10, 1972, it seems altogether likely that attempts were made informally in order to secure Judge Shaw's compliance. When these informal approaches failed, the Council had no choice but to direct compliance forthwith.

Having been advised of the order of the Council by the proceedings before Judge Shaw which culminated in his order of May 2, 1972, Nolan's only recourse, other than to file a petition for mandamus in the Supreme Court, was to petition the Council for reconsideration of its order.[3]

---

3. That Nolan was fully cognizant of his opportunity to petition the Circuit Council for reconsideration is evident from a reading of his Petition to the Supreme Court for Writ of Prohibition and/or Mandamus which states at page 21 that "Petitioner in this case does not know whether he is required to seek relief in the Court of Appeals . . . . or before the Judicial Council."

The public and the bar demand of the federal judiciary and its officers adherence to the highest standards of conduct. Cf. ABA Code of Judicial Conduct Canon 1 (1972).[4] Not only must matters be handled fairly and impartially by judges and officers of the courts, there must not even be the appearance of possible unfairness and partiality. Cf. ABA Code of Judicial Conduct Canon 2 (1972); ABA Code of Professional Responsibility Canon 9 (1969). See the Report of Proceedings before the Judicial Conference of the United States for October 31 and November 1, 1969, Annual Report of the Administrative Office of the United States Courts, 1969, pp. 50-52, and the Report of Proceedings before the Judicial Conference of the United States for March 16, 1970, Annual Report of the Administrative Office of the United States Courts, 1970, pp. 6-9, particularly the statement required to be filed by judges every six months listing participation in any cases where the judge knew at the time that he or any member of his immediate family in his household had any financial interest in any of the parties. The result is that a federal judge almost always disqualifies himself if he, or any member of his immediate family, has any interest whatever, no matter how small, in any of the parties involved in litigation before the court. See also 28 U.S.C. §455.

There is no reason why similarly high standards should not be required of the officers of the federal courts, including counsel to a trustee in a bankruptcy reorganization. Canon 9 of the American Bar Association Code of Professional Responsibility states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Accompanying Canon 9 is Ethical Consideration 9-6[5] which states:

4. On April 6, 1973 the Judicial Conference of the United States adopted the ABA Code of Judicial Conduct as the standard for federal judges with minor modifications not here relevant.

5. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." ABA Code of Professional Responsibility: Preamble.

"Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and *to strive to avoid not only professional impropriety but also the appearance of impropriety.*" [Emphasis added]

Canon 5 of the Code states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-15 amplifies this general language: "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possiblity that his judgment may be impaired or his loyalty divided if he accepts or continues employment. *He should resolve all doubts against the propriety of the representation.*" [Emphasis added]

The spirit of the Bankruptcy Act is entirely consistent with these policies. For example, section 157 provides generally that before an attorney can be appointed to represent a trustee he must qualify as a disinterested person. 11 U.S.C. §556. Section 158 defines interested persons to include those who "for any reason [possess] an interest materially adverse to the interests of any class of creditors or stockholders." 11 U.S.C. §558. One commentator has noted that "this [clause] has rightly been termed a 'catch-all clause,' and it seems broad enough to include anyone who in the slightest degree might have some interest or relationship that would even faintly color the independent and impartial attitude required by the Act." 6 Colliers on Bankruptcy ¶708(5), at 1186 (14th ed. 1972) (footnotes omitted). At the time that Judge Shaw removed Nolan, he clearly fell within the definition of interested persons contained in section 158. Furthermore, section 158 "provides a *minimum* standard for the guidance of the judge in his appointments and insures that persons employed as trustees and their attorneys in the conduct of Chapter X proceedings shall have

that character of independence and disinterestedness which was considered one of the chief aims of Chapter X"; and even if a person's associations do not come within the literal purview of section 158, a judge can reject him if his associations are "prejudicial to disinterestedness." 6 Colliers on Bankruptcy ¶7.08[1], at 1180-81 (14th ed. 1972) (emphasis added) (footnotes omitted). Thus, it is apparent that the same concerns which are embodied in the Code of Professional Responsibility are also present in the statutory scheme governing corporate reorganizations under the Bankruptcy laws.

However, it is no answer to say, as the majority does, that perhaps Nolan could have been appointed attorney for the trustee by the district court in any event because §157 contains a proviso which allows the appointment of an interested person for purposes other than "to represent a trustee in conducting the proceeding under this chapter." 11 U.S.C. §557. This proviso does not detract from the validity of the Circuit Council's action; it provides at most a very limited exception to the statute's general prohibition against the employment of interested persons in reorganization proceedings. Moreover, what is at issue here is not the power of the district court in the exercise of its normal discretion concerning the everyday administration of the bankruptcy courts, but the much more far-reaching authority of the Circuit Council to take corrective action in affairs of judicial administration when it becomes aware of a conflict of interest which presents an appearance of impropriety to the public and which may undermine the public's confidence in the judiciary.

When several of the circuit judges advised the Circuit Council that one of Nolan's clients was proposing a plan for reorganization and that Nolan would still continue to act as counsel, although he was not to be heard from regarding that plan, the Council unanimously concluded that Nolan's continuing as counsel would be highly improper as it would give the appearance of a conflict of interest which could be avoided only by his retirement.

Apparently, informal overtures to Judge Shaw, if any, were unsuccessful. Both the judge and Mr. Nolan thought that Nolan could continue as counsel as to all other matters as long as the creditors were informed that he was not advising regarding the Schiavone plan. The circuit judges were already aware that on two occasions creditors had objected that the district judge had been over-generous to the trustee and his counsel regarding fees. Nolan's continuance as counsel on any basis while the Schiavone plan was being considered would obviously raise very serious questions about possible conflict of interest and might lead to further litigation and more appeals.

The circuit judges were concerned that public confidence in the administration of the bankrupt estate would be shaken unless measures were speedily taken; quite properly they acted without delay. How can we or anyone else question that the Council was well advised and in the best position to estimate the effect which Nolan's continuance would have on public confidence in the administration of justice in the reorganization proceeding? The adoption of a rule which would settle the Nolan matter and at the same time guide the district courts against a similar situation in any other bankruptcy proceedings was entirely proper. It avoided any judgment which would reflect adversely on Nolan's acts while counsel; it merely announced a principle which must be applied to all such situations and as such it was circulated in April 1972 to all the chief district judges of the Third Circuit.[6]

The relevant facts were not in dispute; it was the measures required to maintain public confidence which were contested. The Council concluded, with good reason, that the impasse could be resolved by the order which it adopted. I do not see how there can be any question that the order of February 10 was an order which was necessary for the effective administration of the business of the

---

6. See Plaintiff's Complaint, Appendix to Appellant's Brief at 55a-56a.

district courts in the Third Circuit. In any event this order was well within the statutory powers of the Circuit Council.

After being advised of the resolution Nolan could have petitioned the Council for reconsideration of its order. There is no reason to believe that he would not have been heard had he come forward with any facts or arguments not already known to and weighed by the Council. Failing this, with such respite as the Council would have granted to review the matter, Nolan as an officer of the court was bound promptly to carry into effect the order of the Council, just as Judge Shaw was required by the express language of §332 promptly to comply with the order of the Council. Nolan had no greater standing than the district judge; his duty to comply promptly was just as clear.

Thus I can see no due process requirement that Nolan be given further notice and a hearing. Nolan asked for no more process or hearing until Judge Shaw finally acted on May 2, 1972. On that same day Nolan filed his action for declaratory judgment in the district court.

In the light of the legislative history of §332 and its purpose, as commonly understood, and its subsequent use by the circuit councils, the exercise of council powers is an act of judicial administration. The power is given to the councils as a necessary means of supervising the administration of justice in the federal courts of each circuit. The councils must determine to what extent consultations, notice and hearings are necessary depending on the circumstances of each situation. What is thought necessary or desirable will vary with each occasion. Where it is thought that rules are needed to speed court business and that those most concerned can be helpful, and should be heard to suggest and discuss proposed rules, the council can provide for consultation and a period of time before the proposed rules become effective. This was done by the Circuit Council for the Second Circuit in the course of promulgating Rules Regarding Prompt Disposition of Criminal Cases, which went into effect July 5, 1971 after ten months of discussions which commenced in September, 1970. See United States

ex rel. Frizer, 437 F.2d 1312, 1317 and 28 U.S.C.A. (Supp. 1972). These Rules preceded the adoption of F.R.Crim.P. 50(b).

But where the principle is clear, the facts are undisputed and the need is immediate, the council may act quickly and require immediate compliance. That is this case. Were the requirements otherwise, so that litigation might easily frustrate and delay salutary action, much of the power and the ability of the councils to function would be rendered uncertain and ineffective. It is sufficient safeguard that any action of a circuit council may be brought to the attention of the Supreme Court for correction by mandamus. See opinion of Mr. Justice Harlan in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 89-129.

For the reasons above stated, I would affirm Judge Shaw's order of May 2, 1972, and I would affirm Judge Thomsen's order. Were I to reach the merits, I would hold that the order of the Circuit Council and the manner of its being effected were altogether proper.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A3

United States Court of Appeals - Opinion Denying a Rehearing by 3 Judge Court - May 24, 1973

Nolan

Memorandum and Order

on Petitions for Rehearing

ALDRICH, Senior Circuit Judge. The petition for rehearing filed on behalf of the Circuit Council appears to misunderstand fundamentally the narrow scope of our decision. In the first place, it neglects that, as we pointed out, and as Judge Lumbard in his dissent recognized, the Council's rule, regardless of its form, was designed for Nolan. Nor did we say that we wished to substitute our view of the proper decision for that of the Council. Quite the contrary, our disagreement was basically with procedure; adding, to show that the issue was not moot, that there was another legally possible solution. It is not helpful to have a petition that does not direct itself to what we decided.

Secondly, we do not feel it appropriate, or helpful, to go off the record by referring to alleged ill-health of the district judge (which would in no way eliminate the alternative expressly before the Council, as pointed out by us, of referring the matter to the chief district judge for a hearing); or, more important, by stating that the Council members would aver they were not, in fact, influenced by the charges made against Nolan, and that some did not know all of them. Again, counsel mis-

understands our opinion. We thought we made it clear that what troubled us was that serious charges had been stated to at least two members of the Council, who, for all that was known, might be expected by Nolan to repeat them (even the understandably abbreviated record of the Council meeting refers to the "friction between counsel . . . and certain creditors"), and who publicly "had expressed by no means insignificant criticisms of appellant," of substance, not appearance.

We have no doubt that all members of the Council, in utmost good faith, sought to disregard whatever charges they knew or believed, and to address themselves to the issue. But we can only repeat, what counsel conspicuously ignores, that on this record, for a directive needed by no one except perhaps Nolan, Nolan was "unheard by a body whose very excuse for acting was the necessity of maintaining public confidence in the courts." The harm to Nolan was serious; any offsetting advantages, minimal. We spoke in terms of fairness and due process, and we adhere to that position.

With regard to the Council's present assertion that Chandler v. Judicial Council, 1970, 398 U.S. 74, indicates that we lack jurisdiction, the Council took the opposite position before the District Court in the mandamus proceeding, 346 F.Supp. 500, 511, before the Supreme Court in the brief which led to the denial of appellant's motion for leave to file a petition for mandamus, 409 U.S. 822, and again in its original brief before us. Chandler was decided long before all of those

occasions. Perhaps the Council's present position is correct, but we have already considered it fully, and will not again.

We will deal briefly with the suggestion, also made for the first time, that remand for a hearing should be made to the Council, not to the district court. We respectfully wonder whether the Council really wishes that disposition, in the light of the truly district court nature, as well as the extent, of the matters we believe are to be heard, and of the fact that the Council, unlike the district court, is not au courant with the affairs of the case. In any event, we cannot feel, again with the greatest of respect, that, where there are two possible bodies, the Council is at this point the appropriate one. This is not to suggest that the regular members of the Court of Appeals may not properly review the district court's decision once there is a full record.

The petition for rehearing filed on behalf of the Union Bank calls for no separate comment. We made the charge of taxable costs to that party because of its extraordinary and persistent disregard of the record and of the limited issue that was before us.

We make the following minor corrections in our opinion.

Page 5, strike out the last line of the full paragraph and substitute, "trustee from paying interest on the amount obliged to be refunded, but not Nolan. Nolan appeared, and the creditors cross-appealed."

Page 8, line 10, 514 should be 515.

Page 12, line 5, quotes should close after "appeals."

Page 15, second paragraph, strike first two words, "By this," and substitute, "Again."

Page 15, line 6 of second paragraph, 80 F. Supp. 15 should be 14.

Page 15, fn. 14, enlarge citation to Dodd to terminate, "See Dodd, The Securities & Exchange Commission's Reform Program for Bankruptcy Reorganization, 38 Colum. L. Rev. 223, 230-31 (1938). Cf. 11 U.S.C. §556.

The petitions for rehearing are denied.

Judge Lumbard dissents and votes to grant the petitions for rehearing for the reasons stated in his dissenting opinion.

May 24, 1973.

Appendix A4

Opinion of United States Court of Appeals for Third Circuit EN BANC June 11, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1566

IN THE MATTER OF IMPERIAL "400" NATIONAL, INC., et al.,

Debtors,

JOSEPH M. NOLAN, Appellant.

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,

Intervenor

Appeal From the United States District Court
For the District of New Jersey

Submitted May 25, 1973

PRESENT: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, ROSENN and WEIS, Circuit Judges.

OPINION SUR PETITION FOR REHEARING IN BANC

(Filed Jun. 11, 1973)

Opinion of United States Court of Appeals for Third Circuit EN BANC

SEITZ, Chief Judge.

Petitions for rehearing have been filed by the intervenor, Judicial Council and by the Union Bank. Under Third Circuit procedures, these petitions are appropriately considered both by the panel making the original decision and by the Judges constituting the court in banc. "Preparation and Circulation of Opinions and Procedure For Hearing and Rehearing In Banc (Third Circuit)," Par. 9(a) and (b).

The petitions were therefore referred to the panel, and its majority has denied rehearing before the panel. Since the panel consisted of senior circuit judges from other circuits, they, of course, are not eligible to vote on the petition insofar as it seeks rehearing in banc. 28 U.S.C. §46 (c) (1971). The petitions have now been circulated to the six active judges[1] of the court for in banc consideration.

We are confronted at the outset with our previous decision to recuse ourselves in this litigation. We are now constrained to consider whether, in light of the language in footnote 1 of Judge Lumbard's dissent and the issues of exceptional importance presented in the petition, F.R. App. P. 35(a), we should continue to recuse ourselves in the processing of the petitions insofar as they seek in banc action.

---

1. Two active judges have disqualified themselves throughout for a reason other than their membership on the council.

Some of the important issues are:

1. Does either the District Court or the Court of Appeals have jurisdiction to invalidate action taken by the Council under its rule making power?

2. Assuming jurisdiction, was it permissible for the Court of Appeals to make a judgment in this case, contrary to the Council's, that there was no need for a Council Rule, and invalidate it on that ground?

3. Assuming, contrary to the panel's position, that the Rule is valid, is it invalid as applied to Nolan?

We believe the issues presented warrant rehearing in banc. Nevertheless, we have decided that we should adhere to our previous decision to recuse ourselves. We do so because we originally recused ourselves solely for appearance sake, and we would not want it to appear that we have changed our position as a result of the opinion of the panel majority. Moreover, we are hopeful that the Supreme Court will see fit to review this important matter, especially since we are impelled to recuse ourselves from sitting in banc on these petitions. If it should decide that it was error for us to recuse ourselves solely because we were members of the Council, we would of course, on remand, act on the petitions insofar as they seek to have the court convened in banc.

Opinion of United States Court of Appeals for Third Circuit EN BANC

The participating members of the court have authorized me to enter orders denying the petitions for rehearing in banc with recitals showing that they are being denied since such judges have recused themselves from voting on the petitions solely because of their Council membership.

To the Clerk of the Court:

Please file the foregoing opinion.

Chief Judge

Debtors,

JOSEPH M. NOLAN, Appellant.

UNION BANK - Petitioner

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, ROSENN and WEIS, Circuit Judges.

Appendix A5-6

Orders of United States Court of Appeals for Third Circuit June 13, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1566

IN THE MATTER OF IMPERIAL "400" NATIONAL, INC., et al.,

The petition for rehearing filed by Union Bank in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, since they have recused themselves solely because of their Council membership, the petition for rehearing is denied.

By the Court,

s/ Seitz,
Chief Judge

Orders of United States Court of Appeals for Third Circuit

DATED: June 13, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1566

IN THE MATTER OF IMPERIAL "400" NATIONAL, INC., et al.,

Debtors,

JOSEPH M. NOLAN, Appellant.

THE JUDICIAL COUNCIL OF THE THIRD CIRCUIT,

Intervenor

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, ROSENN and WEIS, Circuit Judges.

Orders of United States Court of Appeals for Third Circuit

The petition for rehearing filed by Intervenor, The Judicial Council of the Third Circuit, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, since they have recused themselves solely because of their Council membership, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

DATED: June 13, 1973

Appendix 7

Order Staying Mandate to July 20, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1566

In the Matter of:
IMPERIAL "400" NATIONAL, INC.,

Debtor

Joseph M. Nolan,

Appellant

Judicial Council of the Third Circuit,

Intervenor

Present: LUMBARD*, ALDRICH** and SMITH*, Circuit Judges

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 20, 1973.

s/ Bailey Aldrich
Judge

Dated: June 18, 1973

*Of the Second Circuit, sitting by designation

**Of the First Circuit, sitting by designation

Appendix 8

Letter from Clerk of Court Regarding Stay
June 18, 1973

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

For the Third Circuit
2046 U.S. COURTHOUSE
Ninth & Chestnut Streets

Philadelphia 19107

Leonard Schaitman, Esquire
Morton Hollander, Esquire
Civil Division-Appellate Section
Department of Justice Room 3635
Washington, D.C. 20530

Re: In the Matter of Imperial "400" National Inc., et al., Debtors--Joseph M. Nolan, Appellant-Judicial Council of the Third Circuit, Intervenor No. 72-1566

Gentlemen:

Enclosed herewith is a conformed copy of the order staying issuance of the mandate to July 20, 1973, in the above-entitled case. If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Letter from Clerk of Court Regarding Stay
June 18, 1973

Very truly yours,

s/ Thomas F. Quinn

Clerk

bjr

cc: Lawrence W. Levine, Esquire
Martin L. Haines, Esquire

BRIEF FOR THE RESPONDENTS IN OPPOSITION

FILE COPY

Supreme Court, U. S.
FILED
AUG 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-145

IN THE MATTER OF

IMPERIAL "400" NATIONAL, INC., *et al.*, *Debtors.*

UNION BANK OF LOS ANGELES,

Petitioner (Cross),

v.

JOSEPH M. NOLAN,

Respondent.

On Cross Petition of Union Bank for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT, JOSEPH M. NOLAN, IN OPPOSITION TO PETITION FOR CERTIORARI

Martin L. Haines
Counsel for Respondent Joseph M. Nolan
The Ashurst Mansion
Mount Holly, New Jersey 08060

Parker Press, Inc., 30 Commerce Street, Newark, N. J.—Market 4-1811-12

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Twentieth Century Fox Film Corp. v. Goldwyn, 328 F. 2d 190, cert. den. 379 U. S. 880 (1964)	4

Rule Cited

Rules of Appellate Procedure:	
39(a)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-145

IN THE MATTER OF

IMPERIAL "400" NATIONAL, INC., *et al., Debtors.*

UNION BANK OF LOS ANGELES,

Petitioner (Cross),

v.

JOSEPH M. NOLAN,

Respondent.

On Cross Petition of Union Bank for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT, JOSEPH M. NOLAN, IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

1. It is suggested by the Cross-Petitioner that the special panel had no authority to "discard" a rule adopted by the Judicial Council, that it then becomes the rule maker, and the rule maker should be the Court of Appeals. The argument is grounded on the theory that the Court of Appeals and its Judicial Council are one and the same and that only that Court, not a special panel of judges, should review the determinations of the Council. No authority is cited in support of this theory and Respondent does not know of any such authority. The bodies, in fact, are distinct, first, in terms of creation, the Council being a statutory body, the Court being Constitutional; and second, as to function, the Council being administrative and the Court judicial. *Chandler* v. *Judicial Council*, 398 U. S. 74 (1970); *Henry* v. *United States*, 432 F. 2d 114 (9th Cir. 1970), *cert. den.* 400 U. S. 1011 (1971), modified on other grounds, 434 F. 2d 1283 (9th Cir. 1971). Aside from this, the argument ignores the circumstances that the panel was, in fact, sitting as a Court of Appeals by designation of the Chief Justice. Consequently, acting as and for the Circuit Court, it was possessed of the latter's jurisdiction.

2. The question of whether the Judges of the Third Circuit should have disqualified themselves is not at issue here. Their disqualification is a *fait accompli*. A panel properly designated by the Chief Justice was substituted for them, apparently with their acquiescence. Not only is it too late to argue about the propriety of such arrangement, the point was not urged below.

3. The scope of the decision below was very narrow. It decided only that the Council's rule was directed to one person, the Respondent Nolan, and enforced without

procedural safeguards, since he was removed from office without notice or hearing. In the final analysis, the decision addressed itself to questions of procedure appropriate for Council and Respondent, nothing more. (Pet. App. 36a). That decision is not in conflict with any decision in any other Circuit or in this Court, and no authorities are cited to support a contention that such conflict exists.

The determination below dealt with the elementary question of due process. The issue is not one which should engage the attention of this Court.

4. The Court below allowed costs to Respondent, assessing them against the Cross-Petitioner, Union Bank. Rule 39(a) of the Rules of Appellate Procedure provide for the taxation of costs in various circumstances "unless otherwise ordered by the Court". Thus, the Court is given discretion. In this cause, the discretion was exercised to require Union Bank to pay all costs, a proper exercise of the taxing power. The causes below were consolidated. Petitioner would separate them for the purpose of assessing costs, since this supplies an argument. The separation is not helpful. The most cursory reading of the record below supports the conclusion that Petitioner's counsel filed lengthy, improper and immaterial documents with the Court of Appeals, some of which formed the basis for Council's action, and certainly was the cause of much unnecessary expense to the Respondent. The special panel commented on petitioners actions below in taxing costs:

> "We made the charges taxable costs to that party because of its extraordinary and persistent disregard of the record and of the limited issue that was before us" (Pet. App. 36a).

The assessment of this expense against the Petitioner was not only within the discretion of the Court below, it was just.

Aside from matters of discretion, it is the rule in the Federal Courts that appeals from decrees for costs are forbidden unless the power of the court to make the assessment is in question, and not merely the exercise of its discretion. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78 (1924); *A. B. C. Packard Inc.* v. *General Motors Corp.*, 275 F. 2d 63 (1960). Some lower courts have suggested that questions involving the abuse of discretion in taxing costs may be raised on appeal. *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, cert. den. 379 U. S. 880 (1964). The facts here do not justify any inference that discretion was abused. At best, the question concerning costs does not raise a significant issue.

CONCLUSION

For the reasons stated, Petitioner's application for a writ of certiorari should be denied.

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